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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 271

J. T. SMITH, *Petitioner*,

v.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA, AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI	1
Introductory Statement	1
Opinion Below	2
Summary Statement of Matters Involved	2
Jurisdiction	4
Questions Presented	4
Reasons for Allowance of Writ	5
BRIEF IN SUPPORT OF PETITION FOR CERTIORARI	7
Statement	7
Specifications of Error	8
Argument and Authorities	9
A. The cause of action upon the promissory note pending in the District Court of Creek County was wholly extinguished and terminated upon judgment being rendered on said note in the Kansas Court	9
B. A cause of action on a foreign judgment constitutes a separate and independent cause of action	11
C. A cause of action complete within itself, stating a cause of action on a foreign judgment cannot be prosecuted by supplemental petition to an action on a promissory note within general law, nor Section 256 O. S. 1931 as construed by Oklahoma courts	13
D. The Supreme Court of Oklahoma erred in denying to petitioner the equal protection of the law, thereby holding in effect that the law means one thing for some persons and another for others similarly situated	18
E. Writ of certiorari should issue	21
Appendix	22

TABLE OF CASES.

Page

Adams v. Webb, 104 Okl. 180, 230 Pac. 878..... 16
Austin v. Jones, 47 Kan. 565, 28 Pac. 621 17
Black v. Russell, 130 Okl. 180, 266 Pac. 448..... 10
Brink v. Bartlett, 146 Okl. 111, 294 Pac. 106 10
Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U. S. 673 21
Buchanan v. Warley, 245 U. S. 60 19
Busse v. Busse, 161 Okl. 159, 17 Pac. (2d) 511..... 18
Cassidy v. McFadden, 3 Ind. Terr. 543, 104 S. W. 829.. 14
Chambers v. Baltimore & O. R. Co., 207 U. S. 142.... 20
Corbin v. Wilkinson, 175 Okl. 247, 52 Pac. (2d) 45.... 15
Cressler v. Brown, 79 Okl. 170, 192 Pac. 417 10
Cumberland Coal Co. v. Board, 284 U. S. 23..... 20
Cushing Gasoline Co. v. Hutchins, 93 Okl. 13, 219 Pac. 408 18
Dawkins v. Peoples Bank & Trust Co., 117 Okl. 181, 245 Pac. 594 18
Frost v. Corporation Comm. of Okl., 278 U. S. 515.... 20
Furness, Withy & Co. v. Yank-Tsze Ins. Asso., 242 U. S. 430 6
Gardner v. Autrey, 170 Okl. 526, 40 Pac. (2d) 1042.. 12
Garr Scott & Co. v. Rogers, 46 Okl. 67, 148 Pac. 161.. 18
Great Northern Ry. Co. v. Sunburst Oil & Refg. Co., 287 U. S. 358 .....19, 21
Gunning v. Cooley, 281 U. S. 90 6
Lane v. Choctaw O. & G. Co., 19 Okl. 324, 91 Pac. 883.. 17
Lausten v. Lausten, 55 Okl. 518, 154 Pac. 1182..... 18
Loffland Bros. Co. v. Velvin, 152 Okl. 83, 3 Pac. (2d) 855 16
Louisville & N. R. Co. v. Bosworth, 230 Fed. 191 (Affirmed as to Federal question 244 U. S. 522)..... 19
Miller v. National Surety Co., 159 Okl. 76, 14 Pac. (2d) 228 12
Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313 21
National Bank of Anadarko v. First Natl. Bank, 39 Okl. 225, 134 Pac. 866 15
Sanders v. Shaw, 244 U. S. 317, 320 20
Scott v. Price, 123 Okl. 172, 247 Pac. 103..... 18
Seekatz v. Brandenburg, 150 Okl. 55, 300 Pac. 678.... 18
State ex rel. Morrison v. City of Muskogee, 70 Okl. 17, 172 Pac. 796 13

Page

Swedish National Bank v. Dickinson, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285 16
Sunday Lake Iron Co. v. Wakefield Tp., 247 U. S. 350.. 20
Territory v. Woolsey, 35 Okl. 545, 130 Pac. 934..... 17
Truax v. Corrigan, et al., 257 U. S. 312..... 20
United States v. Leffler, 11 Pet. (U. S.) 86 10
Wakeman v. Peter, 52 Okl. 639, 152 Pac. 455..... 11
Wynnewood Cotton Oil Co. v. Moore, 54 Okl. 163, 153 Pac. 633 15
Yick Wo v. Hopkins, 118 U. S. 356 19

STATUTES.

Subdivisions 1 and 4 of Sec. 101 O. S. 1931.....8, 12
Section 164 O. S. 1931 13
Section 256 O. S. 1931 ....8, 14
Section 551 O. S. 1931 15
Section 10957 O. S. 1931 3
Section 905 R. S. (28 U. S. C. A.) Sec. 687..... 12
28 U. S. C. A. 237-344 (b) 21

TEXT BOOKS.

21 C. J. 543 14
49 C. J. 571 14

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THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

INTRODUCTORY STATEMENT.

Petitioner, J. T. Smith, respectfully prays certiorari to review a decision of the Supreme Court of Oklahoma affirming a judgment *in personam* by the District Court of Creek County, Oklahoma, which he asserts was entered over his objection without jurisdiction of the subject matter under the settled decisions of the Supreme Court of Oklahoma, none of which have been modified or overruled. That under

the settled law of Oklahoma, the court acquires no jurisdiction by supplemental petition of a state of facts which in themselves constitute a new, separate and independent cause of action, but, on the contrary, said new and independent cause of action must be filed and prosecuted as a new and independent cause of action. The opinion of the Supreme Court of the State, in failing and refusing to follow and apply the settled law which has stood and still stands as applicable to all other litigants similarly situated under identical facts, has thereby denied to petitioner the equal protection of the law guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

OPINION BELOW.

The opinion of the Supreme Court of Oklahoma is not officially reported in the Oklahoma Reports, but is reported 112 Pac. (2d) 158, and appears herein (R. 127).

SUMMARY STATEMENT OF MATTERS INVOLVED.

The facts are not controverted: Respondent, on August 18, 1933, commenced in the District Court of Creek County an action against petitioner to recover a personal judgment on a promissory note and, as an incident thereto, foreclosure of mortgage (R. 7). During pendency of said action in Creek County, respondent on November 9, 1933, commenced an action in the District Court of Chautauqua County, Kansas on the same identical note and, as an incident thereto, foreclosure of mortgage and, on May 8, 1934, recovered in the Kansas action a personal judgment against petitioner.

Under settled law of Oklahoma, upon personal judgment being rendered on said note against petitioner, the cause of action on the note was wholly extinguished.

Petitioner, after the cause of action on the note had been merged in the Kansas Judgment, filed in the District Court of Creek County his answer and, among other defenses, pleaded the Kansas judgment as a bar to the suit on the

note (R. 28). Respondent, realizing the cause of action on the note had been merged in the Kansas judgment and a new, separate and independent cause of action created, on December 12, 1934, without notice or an opportunity to be heard, obtained an order of the trial court to, and did file in said cause in Creek County a pleading denominated an "Amended Petition" which was complete within itself, without reference to any other pleading, and sought a personal judgment against petitioner based upon an authenticated copy of the Kansas judgment and, as an incident thereto, to foreclose mortgage (R. 32). This pleading being complete within itself, under the settled law of Oklahoma superseded the original petition and the same no longer constituted a part of the record. Respondent's amended petition, on motion of petitioner, was stricken by order of the District Court of Creek County on February 5, 1935 (R. 75). No appeal was taken from said order striking the amended petition and, under settled law, the amended petition being complete within itself and stating a cause of action upon a foreign judgment, the order striking said pleading left nothing before the court and constituted a final order, and the district court after the term was without jurisdiction to vacate or modify the same.

After two terms of court had expired and after limitations as to the foreign judgment, the mortgages being extinguished under Section 10957 O. S. 1931 by lapse of time, respondent (R. 76) on November 6, 1935, filed a motion to vacate said order striking the amended petition and to permit the pleading to be denominated a supplemental petition, which, over objection of petitioner, was sustained (R. 77). Petitioner, therefore, over his objection, was compelled, in an action on a note which action no longer existed as the note had been merged in judgment, to answer the new, separate and independent cause of action based upon a foreign judgment, presented by a pleading denominated a "supplemental petition". Petitioner answered (R. 85) contending the action set up in said pleading which sought a personal judgment against petitioner on the Kansas judg-

ment was a new and independent cause of action and must be prosecuted as such, and that the court in the original proceeding upon the note acquired no jurisdiction over the subject matter of an action on a foreign judgment, and was without jurisdiction to render judgment in said proceeding on the new and independent cause of action. The petitioner also pleaded limitations and that the mortgage was extinguished. The District Court denied said plea (R. 113) and rendered a personal judgment against said petitioner based upon the Kansas judgment. All proper exceptions were duly saved. On appeal to the Supreme Court of the State, the opinion of said Supreme Court evaded the question presented and affirmed the personal judgment against petitioner.

JURISDICTION.

This is a petition for a writ of certiorari to review an opinion of the Supreme Court of Oklahoma, under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. #344 (b)) and under Paragraph 5(a) of Rule 38.

The opinion (R. 127) of the Supreme Court of the State of Oklahoma was rendered September 17, 1940. The petition for rehearing was denied (R. 138) February 18, 1941 and a stay duly granted to July 15, 1941 (R. 140). An extension of time was duly granted, (R. 140) by this Honorable Court to July 15, 1941.

QUESTIONS PRESENTED.

Whether, under the facts in this case, the Supreme Court of Oklahoma has denied petitioner the equal protection of the settled laws of Oklahoma, as applied to other litigants, in that he has been denied the benefits of the settled laws of Oklahoma which conclusively adjudicate:

(a)—The judgment *in personam* rendered on the promissory note in the District Court of Chautauqua County, Kansas, wholly extinguished the original cause of action

on the same note in the District Court of Creek County, Oklahoma.

(b)—The pleading designated an "Amended Petition" (R. 32) whether termed as an amended petition or a supplemental petition, being complete within itself without reference to the original petition and seeking a personal judgment based upon the Kansas judgment, wholly superseded the original petition in the Oklahoma action and the original petition thereafter constituted no part of the record in said cause.

(c)—That the cause of action set forth in the pleading designated an amended or supplemental petition seeking a personal judgment on the foreign judgment rendered in Kansas being complete within itself, judgment could only be rendered thereon based upon an authenticated copy of the foreign judgment as prescribed by the Act of Congress, Revised Statutes, Section 905 (28 U. S. C. A. Section 687).

(d)—The cause of action set forth in the amended pleading was neither an amendment to the petition nor a supplement to it in aid of the original petition, but constituted a new, separate and independent cause of action.

(e)—The District Court of Creek County acquired no jurisdiction in the suit on a promissory note by either an amended or supplemental pleading over the objection of petitioner to render a personal judgment on an action based and founded solely upon a foreign judgment.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

Petitioner states that in denying to him the equal protection of the law, the Supreme Court of the State of Oklahoma has thereby decided a Federal Question of substance herein heretofore determined by this court in principle, and has decided said question in a way not in accord with

the applicable decisions of this court construing the same principle of law.

Petitioner further states that the opinion of the Supreme Court of Oklahoma is clearly erroneous and in conflict with the settled law as announced in its former decisions which are not overruled or modified. The question of the state court, in construing the laws of the state to mean one thing for some litigants and another thing for other litigants is of great importance, not only to the petitioner, but to every other person in the United States, and likewise it brings a question of substantive law that the precise question herein urged be passed upon by this Honorable Court.

In the interest of brevity, Rule 38 Par. 2; *Furness, Withy & Co. Ltd.* v. *Yank-Tsze Ins. Asso. Ltd.*, 242 U. S. 430, petitioner does not at this time set forth all the points which will be urged at the argument on the merits of this cause, should the writ be allowed, nor all of his contentions in support of such points, but in order to comply with the rules of this court requiring that all issues upon which decisions are requested be presented in the petition for certiorari (*Gunning* v. *Cooley*, 281 U. S. 90-98), petitioner here refers to and incorporates in this petition all the matters presented in his assignments of error on the appeal to the Supreme Court of Oklahoma (R. 2-6) and petition for rehearing (R. 132) with the same force and effect as if herein set forth.

Wherefore, Petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Oklahoma.

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J. T. SMITH, *Petitioner*,

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THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

Certiorari is sought to review an opinion (R. 127) (Not yet appearing in the official Oklahoma reports, but appearing in 112 P. (2d) at page 158) of the Supreme Court of Oklahoma, wherein the court affirmed a decree (R. 113) of the District Court of Creek County, Oklahoma, entered upon findings of fact and conclusions of law (R. 108). The Federal question was raised as an additional ground for granting a petition for rehearing (R. 132 and 135) in the Supreme Court. Rehearing was denied (R. 138) without any statement. The jurisdiction of this Honorable Court is invoked upon the grounds set forth in the petition for certiorari, *supra* P. 4. The facts in the petition for the writ, P. 2, are set forth in the various pleadings and are

not complicated nor controverted. Briefly stated, the instant case involves the important question of the construction of the laws of the State of Oklahoma and whether each litigant is entitled to the equal protection thereof, or whether the court may construe the same to mean one thing for certain litigants and another thing for this petitioner. The petitioner had no reason to anticipate that the Supreme Court would deny to him the equal protection of the settled law of the state prior to the filing of the opinion in the instant case, or that it, by making no reference thereto, would evade the settled applicable law, all of which, when considered with uncontroverted facts, appear on the face of the opinion.

SPECIFICATIONS OF ERROR.

The judicial errors complained of in the proceeding are as follows:

I.

The Supreme Court of Oklahoma having in its prior decisions, which have never been overruled or modified, announced the following propositions as settled law of said state, to-wit:

(a) That upon a personal judgment being rendered on a promissory note, whether in the State of Oklahoma or in a foreign state, the cause of action is merged in the judgment and the cause of action on the note no longer exists, but is wholly extinguished;

(b) That under and by virtue of subdivision 4 of Section 101 O. S. 1931, an action based upon a foreign judgment (R. 62-65) to recover a personal judgment thereon in the State of Oklahoma constitutes a new and independent cause of action;

(c) That by uniform decisions the Supreme Court of Oklahoma has adjudged that Section 256 O. S. 1931 means that a supplemental petition (R. 32) must be in

aid of the cause of action set forth in the original petition;

(d) That a pleading complete within itself, without reference to any former pleading stating a cause of action on a foreign judgment, states a new and independent cause of action, and cannot be prosecuted by supplemental petition in an action on a promissory note, but, on the contrary, must be filed as a new and independent cause of action;

erred under facts not distinguishable in not applying said principles of law in the instant case.

II.

The Supreme Court of Oklahoma, without overruling or modifying the settled law of Oklahoma as above set forth, erred in denying to petitioner the equal protection thereof, by evading such settled law and refusing to apply the same to petitioner under applicable facts not controverted, thereby holding in effect that the law means one thing for some persons and another for petitioner.

ARGUMENT AND AUTHORITIES.

(A)—The Cause of Action Upon the Promissory Note Pending in the District Court of Creek County Was Wholly Extinguished and Terminated Upon Judgment Being Rendered on Said Note in the Kansas Court.

The fact that the original suit in the District Court of Creek County was to recover upon promissory note, and the note was reduced to judgment in the State of Kansas is reflected in the opinion by the following language (R. 127):

"This is an appeal from Creek County * * * the plaintiff brought suit for the balance due on a note given by the defendant, secured by real estate mortgages * * * At about the same time a similar suit was filed in Kansas in which the defendant entered his

appearance, and judgment was rendered against him and for foreclosure * * * ."

The above facts being conceded, it follows that under the decisions of said state, to-wit:

Cressler v. *Brown,* 79 Okl. 170. 192 P. 417;
Black v. *Russell,* 130 Okl. 180, 266 P. 448;
Brink v. *Bartlett,* 146 Okl. 111, 294 P. 106;
United States v. *Leffler,* 11 Pet. (U. S.) 86;

the cause of action on the promissory note pending in Creek County, Oklahoma, upon judgment being rendered in the Kansas court upon said note, was wholly extinguished.

In *Black* v. *Russell, supra,* the court quoted from *Olson* v. *Dahl,* 99 Minn. 433, 109 N. W. 1001, as follows:

> "It is elementary that cause of action is merged in a judgment, and upon the entry of the judgment the same becomes changed in form and its original character wholly extinguished. The rule is stated in United States v. Leffler, 11 Pet. (U. S.) 86, 9 L. Ed. 642, as follows:
>
> > 'If there be one question of law settled beyond all questions, it is this: That whenever a cause of action in the language of the law, transit in rem judicatus (becomes a matter adjudged) and the judgment remains in full force and unreversed, the original cause of action is merged and gone forever.'
>
> "Such is the rule in all the courts, so far as our examination of the authorities have extended. The original cause of action loses its identity and character and is changed and transferred into another cause of action, a judgment, and it can no longer be made the basis of another action."

In *Brink* v. *Bartlett, supra,* it is stated:

> "It is well settled that: 'If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it'. Kes-

sler v. Eldred, 206 U. S. 285, 27 S. Ct. 611, 613, 51 L. Ed. 1065. It has been ruled that, 'where two actions between the same parties, involving the same cause of action, proceed at the same time in courts of concurrent jurisdiction, it is not the final judgment in the action first brought, but the first final judgment, although it may be in the action last brought, that renders the issues res adjudicata in both actions.' McDougal v. Black Panther Oil & Gas Co. (C. C. A.) 273 F. 113, 116; Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 S. Ct. 506, 61 L. Ed. 1149, 34 C. J. 886."

In *Cressler* v. *Brown, supra,* it is said:

"The cause of action thus being merged in the former judgment, the parties and their privies are precluded in a subsequent suit, involving the same cause of action from availing themselves of any point of law or fact, * * * the cause of action is destroyed in its entirety. It is ended and terminated, irrespective of the facts or legal propositions considered by the court rendering the judgment."

The above decisions have never been overruled or modified in any manner and they stand today as the law of Oklahoma.

It follows that if a cause of action is wholy extinguished and terminated, there remains nothing to do except dismiss the same.

(B)—A Cause of Action on a Foreign Judgment Constitutes a Separate and Independent Cause of Action.

A cause of action upon a judgment is not an action on contract is the settled law in Oklahoma and announced in *Wakeman* v. *Peters,* 52 Okl. 639, 152 P. 455, as follows:

"But an action on a judgment is not an action on a contract, express or implied, within the meaning of these words as used in the Statute. In Morely v. Lake Shore Railway Company, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 92, in passing on the question whether a judgment is a contract, the court says:

> 'The most important elements of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented or promised to pay. "A judgment is in no sense a contract or agreement between the parties." ' "

Nor is such an action governed and controlled by the same Statute, 101 O. S. 1931, relating to limitation of actions, which, reads, in part as follows:

> "Civil actions, other than for the recovery of real estate, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> "First: Within five years: An action upon any contract, agreement or promise in writing.
>
> * * * * *
>
> "Fourth: Within one year: An action on a foreign judgment; * * *."

The Supreme Court of Oklahoma in construing said Section of the Statute, in *Miller* v. *National Surety Company*, 159 Okl. 76, 14 P. (2d) 228, held that a suit to recover money upon a written instrument was governed and controlled by Subdivision 1 as being an action upon a contract. In *Gardner* v. *Autry*, 170 Okl. 526, 40 Pac. (2d) 1042, the court held, a cause of action upon a judgment being rendered in another state is controlled by Subdivision 4 of the above section of the Statute and begins to run on the date of rendition of said judgment.

The cause of action upon a foreign judgment is established by copy of said judgment authenticated in the manner prescribed by Section 905, Revised Statute (28 U. S. C. A. Sec. 687).

The above decisions and statute conclusively establish, when applied to the uncontroverted facts in the instant case, that when respondent obtained a judgment in the District Court of Chautauqua County, Kansas, his cause of action pending in the District Court of Creek County, Oklahoma, on the note was wholly extinguished and terminated,

and his cause of action based upon a foreign judgment constituted a separate and distinct cause of action, governed and controlled by different principles of law.

The above decisions have become the settled law of the state and have never been overruled or modified in any respect.

The method by which the Oklahoma courts acquire jurisdiction of the subject matter of an action is defined by Section 164 O. S. 1931, which reads as follows:

> "A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon."

It follows under the settled law of Oklahoma, as announced in the above decisions, that the filing of a supplemental petition in the District Court of Creek county, in an action on a promissory note over the objection of the defendant, conferred upon the court no jurisdiction over a cause of action based on a foreign judgment.

(C)—A Cause of Action Complete Within Itself, Stating a Cause of Action on a Foreign Judgment Cannot Be Prosecuted by Supplemental Petition to an Action on a Promissory Note Within General Law, Nor Section 256 O. S. 1931 as Construed by Oklahoma Courts.

It is a fundamental principle of law generally recognized by the courts, including Oklahoma, *State ex Rel. Morrison* v. *City of Muskogee,* 70 Okl. 19, 172 P. 796, that the character of the pleading is determined by the substance thereof rather than by the title. The pleading under consideration in the instant case (R. 32) is a pleading complete within itself without reference to any former pleading, and alleges a state of facts sufficient to state a cause of action on a foreign judgment.

The controlling question before the Supreme Court of Oklahoma was whether a pleading stating an independent

action upon a foreign judgment could form the basis of a supplemental petition, within the meaning of Section 256 O. S. 1931, on general law, to an action on a promissory note. That such procedure is not authorized under general law is stated in 49 C. J. 571 as follows:

> "supplemental bill or complaint must be consistent with, and in aid of the cause of action set forth in the original complaint; and a new and independent cause of action cannot be set up by such complaint or petition, although it may have arisen out of the same contract that formed the basis of the suit."

The general law is further stated in 21 C. J. 543:

> "If new matters have arisen on which a decree might be rendered without reference to the matters contained in the original, a supplemental bill is improper. Plaintiff should dismiss the original and file a new suit."

It is plain that under general law the court, over the objection of the defendant, acquires no jurisdiction of an action upon a foreign judgment by incorporating said cause of action in a pleading and denominating the same a supplemental petition to an action on a promissory note.

The Statutes of Oklahoma, section 256 O. S. 1931, which reads as follows:

> "Either party may be allowed, on notice, and on such terms, as to costs, as the court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply.",

as construed by Supreme Court of Oklahoma, does not change or modify the general law, but is in strict harmony with the spirit and letter of general law.

The construction of a similar statute was first announced by the Court of Appeals of Indian Territory in *Cassidy* v. *McFadden*, 3 Ind. Territory 543, 104 S. W. 829, in an action wherein the plaintiff had filed suit on account and pending

suit, judgment was taken on account in another state. Plaintiff then sought to prosecute an action on the foreign judgment by supplemental petition filed in the action on account. The court in that case quoted the Indian Territory statute, which is similar to the Oklahoma statute, and stated as follows:

> "Section 5080 provides for supplemental pleadings by the parties alleging facts occuring after the filing of the former petition; held, that in a suit on an open account the complaint could not be amended setting up a judgment obtained in another state of the same cause of action."

In *Wynnewood Cotton Oil Co.* v. *Moore,* 54 Okl. 163, 153 P. 633, the court had under consideration both the Indian Territory statute and the Oklahoma statute relating to supplemental pleading and held that they were "practically the same."

In *National Bank of Anadarko* v. *First National Bank,* 39 Okl. 225, 134 P. 866, the court again construed said section of that statute relating to the filing of supplemental pleadings and in the second syllabus of said case announced the law to be as follows:

> "The facts embodied in a supplemental petition under the Code must relate to the same cause of action set forth in the original petition and must be in aid thereof. It is not proper to bring into a cause by supplemental petition new facts which have arisen since the action was commenced and which by themselves, if they are sufficient, constitute a new and independent cause of action without reference to the facts alleged in the original pleading. In such case relief should be had by a new and independent action. Following the rule in Swedish National Bank v. Dickinson, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285."

It is further settled law in Oklahoma that under and by virtue of Section 551 O. S. 1931, the law of a case is stated in the syllabus: (See *Corbin* v. *Wilkinson,* 175 Okl. 247,

52 P. (2d) 45; and *Loffland Bros. Co.* v. *Velvin,* 152 Okl. 83, 3 P. (2d) 855.)

The court, in the *Anadarko* case having in the syllabus followed the rule announced in *Swedish National Bank* v. *Dickinson,* 6 N. D. 222, 69 N. W. 455, the rule announced therein became the law of the case in Oklahoma, and the syllabi of said case read as follows:

1. "The facts embodied in a supplemental complaint under the Code must relate to the cause of action set forth in the original complaint, and must be in aid thereof.

2. "It is not proper to bring into a case, by supplemental complaint, new facts which have arisen since the action was commenced, and which by themselves constitute a new and independent cause of action, without reference to the facts alleged in the original pleading.

3. "Accordingly, held, that when pending an action upon notes, judgment thereon was recovered in another state, the plaintiff could not file a supplemental complaint alleging recovery of such judgment, but that the rendition thereof constituted a bar to the further prosecution of the action."

The above cases have never been overruled or modified. In *Adams* v. *Webb,* 104 Okla. 180, 230 P. 678, the court stated:

> "Whether such a pleading is amendatory or supplemental must be determined from its substance rather than from the title given it by the pleader. State ex rel. Morris v. City of Muskogee, 70 Okl. 19, 172 P. 796."

The facts in said cases were distinguishable, but in construing the facts therein, the court followed the rule announced in the *Anadarko* case, stating as follows:

> "* * * Clearly, it was the intention of plaintiff in filing the pleading, which he did file, to aid and strengthen the cause of action set forth in his original petition,

> by stating facts arising since the commencement of the action. This constitutes it a supplemental petition. National Bank v. First National Bank, 39 Okl. 225, 134 P. 866."

The language in the *National Bank of Anadarko* case is clear, definite and certain and subject to no other construction than that when an action is pending upon a promissory note, and the judgment has been rendered on said note in another state court, there is thereby created a separate cause of action upon the foreign judgment which must be prosecuted as such, and cannot form the basis of a prosecution of an action by supplemental petition.

This same rule was announced in the Supreme Court of Kansas from which Oklahoma took its statute in *Austin* v. *Jones*, 47 Kan. 565, 28 P. 612, which was decided before Oklahoma adopted the statute, wherein the court stated as follows:

> "Besides, the plaintiff in this case did not attempt by his supplemental petition to set up a *new, separate* and *independent* cause of action, but simply attempted to set forth facts which took place subsequently to the commencement of the action, for the purpose of perfecting or making better his original cause of action."

The above cases are conclusive: That an action upon a foreign judgment is a separate and distinct cause of action and cannot be prosecuted by supplemental petition to an original action based upon a promissory note, although the note formed the basis of the foreign judgment.

It is the settled law of Oklahoma that where a plaintiff files a pleading, whether denominated an amended or a supplemental petition, that is complete within itself and states a cause of action and does not refer to or adopt the original petition, said original petition is superseded and is no part of the record unless introduced in evidence.

> *Lane* v. *Choctaw O. & G. Co.*, 19 Okl. 324, 91 Pac. 883;
> *Territory* v. *Woolsey*, 35 Okl. 545, 130 Pac. 934;

Garr Scott & Co. v. *Rogers,* 46 Okl. 67, 148 Pac. 161;
Lausten v. *Lausten,* 55 Okl. 518, 154 Pac. 1182;
Dawkins v. *Peoples Bank & Trust Co.,* 117 Okl. 181, 245 Pac. 594;
Seekatz v. *Brandenburg,* 150 Okl. 55, 300 Pac. 678;
Scott v. *Price,* 123 Okl. 172, 247 Pac. 103;
Busse v. *Busse,* 161 Okl. 159, 17 Pac. (2d) 511;
Cushing Gasoline Co. v. *Hutchins,* 93 Okl. 13, 219 Pac. 408.

In *Busse* v. *Busse, supra,* the Supreme Court of Oklahoma said:

> "Where an amended petition does not refer to or adopt the original petition, the original petition is superseded and is no part of the record, unless introduced in evidence."

(D)—The Supreme Court of Oklahoma Erred in Denying to Petitioner the Equal Protection of the Law, Thereby Holding in Effect that the Law Means One Thing for Some Persons and Another for Others Similarly Situated.

It is plain under the uncontroverted facts that the practical effect of the judgment of the Supreme Court of Oklahoma is to deprive the petitioner of the benefits of the settled law of the state that jurisdiction of an action on a foreign judgment cannot be conferred upon the court by incorporating said essential facts in a pleading and denominating the same a supplemental petition and filing the same in an action on a promissory note, which law is applicable to others similarly situated under the same identical facts. This is the settled law of the state as applied to certain litigants. That as to this petitioner the court totally disregards and evades the substantive law upon which jurisdiction is conferred upon the court and denies to him the benefits of the settled law of the state. This, under the holding of the former decisions of this court, constitutes a denial of the equal protection of the law under the Four-

teenth Amendment to the Constitution of the United States. This court recognized that rule in *Great Northern Ry. Co.* v. *Sunburst Oil & Refg. Co.*, 287 U. S. 358, 53 S. C. 145, wherein the court stated:

> "The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event."

We do find where this honorable court has in many instances applied the same principle to the executive and legislative branches and, in those instances, has announced the principle that the discrimination must be intentional.

In *Louisville & N. R. Co.* v. *Bosworth*, 230 Fed. 191, affirmed as to the Federal Question in 244 U. S. 522, 37 S. Ct. 683, 61 L. Ed. 129, the court said:

> "Certainly an intentional discrimination is forbidden."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356 it is said:

> "Though a law be fair upon its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as to practically make illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the protection of the Constitution."

In *Buchannan* v. *Warley*, 245 U. S. 60, 38 S. Ct. 16, the court said:

> "While a principal purpose of the latter amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminary legislation by the state."

In *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, the court said:

> "The purpose of the clause in respect to equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances."

In *Sunday Lake Iron Co.* v. *Wakefield, Tp.,* 247 U. S. 350, the court said:

> "The purpose of the equal protection clause of the Fourteenth amendment is to secure to every person within the states jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

In *Truax* v. *Corrigan, et al,* 257 U. S. 312, the court said:

> "* * * this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under similar circumstances and in the same territorial jurisdiction."

The petitioner asserts under the uncontroverted facts that an intentional discrimination appears on the face of the opinion, making it obvious that the Federal question was in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the opinion rendered.

Chambers v. *Baltimore & O. R. Co.,* 207 U. S. 142;
Cumberland Coal Co. v. *Board,* 284 U. S. 23;
Great Northern Ry. Co. v. *Sunburst Oil & Refg. Co.,* 287 U. S. 358;
Saunders v. *Shaw,* 244 U. S. 317.

The petitioner could not anticipate in advance of that event that the Supreme Court of Oklahoma would render an opinion, the effect of which is that the law is held to be one thing for him and another thing for others.

Brinkerhoff-Farris Trust & Savings Co. v. *Hill*, 281 U. S. 673;
Missouri Ex Rel Missouri Ins. Co. v. *Gehner*, 281 U. S. 313;
Great Northern Ry. Co. v. *Sunburst Oil & Refg. Co.*, 287 U. S. 358.

(E)—Writ of Certiorari Should Issue.

From the records in this case it is clear that the District Court is proceeding with the sanction of the Supreme Court of Oklahoma in the exercise of an assumed jurisdiction not vested in it by the settled law of the state, and is denying to petitioner the equal protection of the settled law of the state announced by the former decisions of said Supreme Court which have not been and are not reversed, overruled or modified.

The cases heretofore cited disclose the opinion of the Supreme Court of Oklahoma permits and authorizes the jurisdiction of a cause of action against this petitioner by a pleading that states a cause of action based on a foreign judgment filed in a pending proceeding upon a promissory note, while as to other persons similarly situated under identical facts, the court holds that such a proceeding is unauthorized and jurisdiction is not conferred thereby.

Because of the grave consequences that will result if the courts of the state are permitted to administer the laws in a manner that they do not apply to all litigants equally, it is respectfully submitted that the writ of certiorari should issue under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1926 (28 U. S. C. A. 344b) and under Paragraph 5 (a) of Rule 38, and the case of *Great Northern Ry. Co.* v. *Sunburst Oil & Refg. Co.*, and other cases *supra*.

NEAL E. MCNEILL,
Counsel for Petitioner,
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Tulsa, Oklahoma.

W. VALJEAN BIDDISON,
Of Counsel.

APPENDIX.

	Record Page
Original Petition, Creek County, Oklahoma	2
Kansas Proceedings	43
Certificate of Authentication	43
Petition	44
Judgment	62
Order Confirming Sale	74
Answer, Creek County	28
Claimed Supplemental Petition	32
Order Striking Claimed Supplemental Petition	75
Petition to Reinstate Claimed Supplemental Petition	76
Order Reinstating Claimed Supplemental Petition	77
Answer	85
Reply	89
Requested Findings of Fact and Conclusions of Law	104
Court's Findings of Fact and Conclusions of Law	108
Judgment	113
Motion for New Trial	120
Order Overruling Motion for New Trial	123
Assignments of Error	2-6
Opinion of Supreme Court of Oklahoma	127
Petition for Rehearing	132
Order Denying	138
Application to File Second Petition for Rehearing	139
Order Denying	139
Order Staying Proceedings	140
Order Extending Time to File Petition for Certiorari	140

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No. 271

In the Supreme Court of the United States

October Term, 1941.

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

Response to Petition for Writ of Certiorari.

CHAS. L. YANCEY,
G. C. SPILLERS,
KAVANAUGH BUSH,
Beacon Building,
Tulsa, Oklahoma,
Counsel for Respondents.

INDEX.

PAGE

Statement 1

Argument and authorities 4

PROPOSITION I. This being an ordinary action for personal judgment on a promissory note and the foreclosure of a mortgage, there is no federal question involved and the application for the writ should be denied 4

Conclusion 5

TABLE OF CASES.

Erie Railroad Company v. Tompkins, 82 L. ed. 1188.. 4

Smith v. The Fourth National Bank of Tulsa, (Okla.) 73 P. (2d) 414 3

The Fourth National Bank of Tulsa v. Smith, (Kan.) 44 P. (2d) 242 2

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. 271

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement.

This application appears to be another attempt on the part of the petitioner to delay or evade the payment of an honest debt.

On May 5, 1931, John T. Smith, an attorney of Sapulpa, Oklahoma, made, executed and delivered to The Fourth National Bank of Tulsa his promissory note for the sum of $9,800.00, due August 3, 1931. Smith received the money on this note and gave a mortgage on certain real estate in Creek and other counties in Oklahoma, and in Chautauqua County, Kansas, to secure the payment thereof. The bank was lenient and extended time of payment until May 22, 1933, at which time Smith, the maker of the note, had paid

thereon the sum of $1,300.00, leaving a balance due of $8,-500.00. Smith, without reason therefor, declined to make further payments, and the bank brought two suits contemporaneously for judgment and foreclosure, one in Creek County, Oklahoma, and the other in Chautauqua County, Kansas. Smith, by dilatory tactics, was enabled to delay the trial of the case in the county of his residence, Creek County, Oklahoma, much longer than he was able to delay the case in Chautauqua County, Kansas. Consequently, the case in Kansas was tried first. Smith interposed various and sundry dilatory tactics and untenable defenses. Judgment was entered against him in Chautauqua County, Kansas, for the balance due. In order to delay payment, Smith appealed to the Supreme Court of Kansas, where that case was affirmed. *The Fourth National Bank of Tulsa* v. *Smith*, 44 P. (2d) 242.

The property covered by the mortgage in Chautauqua County, Kansas, was sold and the proceeds applied toward the liquidation of the judgment, which left a balance of $7,827.85, with interest. The respondent, The Fourth National Bank of Tulsa, then filed an amended pleading in the District Court of Creek County, Oklahoma, and acknowledged credit on the indebtedness, which credit was derived from the sale of the property in Kansas and left a balance of $7,827.85 with interest. Smith, in pursuance of the dilatory tactics he has always employed, filed a motion to strike the amended petition, although it gave him a credit. This was sustained, and thereafter The Fourth National Bank of Tulsa filed its motion to vacate the order sustaining the motion to strike, which was accordingly done, and from that interlocutory order Smith appealed to the Supreme Court of the State of Oklahoma. That court, after much delay, held that the order which Smith was attempting to appeal from was not an appealable order and dismissed the ap-

peal. *Smith* v. *The Fourth National Bank of Tulsa,* 73 P. (2d) 414. After this long delay by a worthless attempt at appealing a non-appealable order, the case came on for trial. Thereupon, Smith, the attorney from Sapulpa, Creek County, Oklahoma, petitioner herein, employed in addition to the lawyers connected with the case, one William Cheatham, an attorney of Bristow, Oklahoma, who was the former law partner of Honorable C. O. Beaver, the then presiding district judge in Creek County. The issues were made up, evidence submitted, and a judgment entered by the trial court, Honorable C. O. Beaver presiding, in favor of The Fourth National Bank of Tulsa and against Smith, for the relief prayed for, including adjudication of the lien and ordering foreclosure as against the real estate covered by the mortgage in Creek and other counties of the State of Oklahoma. The motion for new trial was overruled and an appeal taken to the Supreme Court of the State of Oklahoma for the second time. An opinion was written, affirming the judgment of the trial court. A petition for rehearing was filed and denied. An application for leave to file a second petition for rehearing was filed, and denied. And then the mandate issued to the trial court; whereupon an application was made by Smith to recall the mandate, and now he is attempting, after having his day in court, once in the Supreme Court of Kansas and twice in the Supreme Court of Oklahoma, in an ordinary mortgage foreclosure, to get into this court.

The petitioner herein has made one continuous effort for approximately nine year, eight of which have been spent in the courts of Kansas and Oklahoma, to evade an honest debt and defraud The Fourth National Bank out of its funds. He has used all the dilatory tactics known to the law, and has not once contended that he did not execute the note and mortgage, make payments thereon, or deny that the

amount of the judgment rendered is not due and owing. His only defenses have been technicalities, promptly overruled by the trial and appellate courts of Oklahoma and Kansas.

We submit the following:

Argument and Authorities.

PROPOSITION I.

This being an ordinary action for personal judgment on a promissory note and the foreclosure of a mortgage, there is no federal question involved and the application for the writ should be denied.

This court, in the case of *Erie Railroad Company* v. *Tompkins,* 82 L. ed. 1188, speaking through Mr. Justice BRANDEIS, said:

> "Excepting matters governed by the federal constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision, is not a matter of federal concern. There is no federal general common law."

The petitioner asserts that he has been deprived of the equal protection of the law, but when we examine the record we find no federal question involved, but we further find that he has had his day in court, both in the district and supreme courts of Kansas and in the District Court of Creek County, including two appeals from that court to the Supreme Court of the State of Oklahoma. Counsel for petitioner says that the Supreme Court of Oklahoma has failed to follow the settled law of the state. We say not. In any event, following the decision of this court in the *Erie Railroad* case, the Supreme Court of Oklahoma alone has the

right to pass upon and determine the laws of the State of Oklahoma so long as Acts of Congress and the Federal Constitution are not involved, and certainly where a court of justice enters a personal judgment against the defendant who has borrowed money from a bank and refuses to repay it, and for foreclosure of the mortgage, it is doing nothing but what justice and the law require. To hold otherwise would fly in the teeth of both law and justice.

After eight years of litigation, with no defense to an action on a promissory note and request for foreclosure of a mortgage, petitioner Smith clamors for more. If it were possible John T. Smith, petitioner herein, should be penalized for all these unreasonable delays and items of expense to which he has put the respondent herein in an effort to collect its debt against him.

Conclusion.

The only question here is—how long Smith can evade the payment of a debt created by direct borrowing from a bank, which fact he does not deny, and admits has not been paid. There is no other real issue. All questions have been passed upon by the appellate courts of Kansas and Oklahoma. There is no federal question involved.

It is respectfully submitted that the petition for writ of *certiorari* is without merit, is made for delay only, and should be denied.

CHAS. L. YANCEY,
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KAVANAUGH BUSH,
Beacon Building,
Tulsa, Oklahoma,
Counsel for Respondent.

(32)

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No. 271

In the Supreme Court of the United States

October Term, 1941.

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

Reply to Brief of Respondent on Petition for Writ of Certiorari.

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W. VALJEAN BIDDISON,
Of Counsel.

INDEX.

	PAGE
Statement	1
Reply to argument and authorities	5
Conclusion	7

TABLE OF CASES.

Erie R. R. Co. v. Tompkins, 304 U. S. 64 to 92	6
Lane v. Choctaw O. & G. Co., 19 Okl. 324, 91 Pac. 933	4

STATUTES.

Oklahoma Statutes 1931, Sec. 101, subd. 101	4
Oklahoma Statutes 1931, Sec. 10957	4

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. 271

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

REPLY TO BRIEF OF RESPONDENT ON PETITION FOR WRIT OF *CERTIORARI.*

Statement.

The response herein does not refer to the page or point in the record relied upon to support the statements therein contained, as required by Rule 27 (3) of this court. The petitioner does not feel justified in entirely ignoring the numerous unwarranted innuendoes and inaccurate statements contained in the response which are asserted as facts. The purpose of these, it is assumed, is to cloud the issues and create an unwarranted prejudice against petitioner to the extent that this court might, in the exercise of its discretionary power, overlook the real questions in issue, to-wit:

(a) The right of the petitioner to the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States; *(b)* the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others.

The assertion that petitioner is a Sapulpa attorney is unsupported by the record as the record is silent on this point. It is, however, a known fact that petitioner, prior to 1919, was in the active practice of law at Sapulpa but has been otherwise engaged since said date and, since 1925, resided in Tulsa until long after the trial herein.

Respondent by innuendo reflects upon the propriety of the petitioner employing one William Cheatham, a former partner of the trial judge. The record is silent on this point but, if permitted, we could show that such partnership had been terminated many years. Mr. Cheatham then represented the petitioner in other matters and, after judgment in the trial court, he was employed as a local attorney for the preparation of the record for appeal and paid a nominal fee of $50.00. The judgment prepared (C-m. 113-120) by attorneys for respondent discloses that Mr. Cheatham was not an attorney in the trial.

Respondent, without reference to the record, throughout its statement of the case, refers to dilatory tactics of the petitioner, apparently upon the theory that if it can convince this Honorable Court that the petitioner has been guilty of dilatory tactics, it avoids the question of lack of jurisdiction in the trial court and constitutes a justification for denying the petitioner the equal protection of the law.

Respondent, on page 2 of the response, asserts that the bank brought two suits on this particular note contempo-

raneously, one in Creek County, Oklahoma, and one in Chautauqua County, Kansas. The record, page 17, discloses that a suit on the promissory note was filed in Creek County on May 13, 1933, and the suit in Chautauqua County, Kansas, was not filed contemporaneously, but was filed November 9, 1933. (R. 52) Petitioner filed his answer in the District Court of Chautauqua County March 6, 1934. (R. 54-58) The case was set for trial (R. 61) by stipulation, April 12, 1934, and heard on said date, and taken under advisement by the court and judgment rendered on May 8, 1934. Motion for new trial was overruled June 4, 1934. (R. 65) This judgment was not superseded nor delayed by the petitioner, as asserted in the response, as execution was issued June 27, 1934 (R. 70), and sale had and confirmed August 7, 1934. (R. 74) The appeal in the Kansas court was not decided until May 4, 1935.

The record discloses with respect to petitioner's conduct in the Creek County action upon the motion for new trial being overruled (R. 65) in the Kansas case, June 4, 1934, and the note merged in said judgment, petitioner, two days thereafter or on June 6, 1934, filed his answer in the District Court of Creek County (R. 28) and, as a defense to the suit on the note (R. 30-31), pleaded the note had been merged in the judgment in the District Court of Chautauqua County, Kansas, on May 8, 1934, which constituted an abatement of and a bar to the suit on the note; that under the decisions of the Supreme Court of Oklahoma, upon judgment being rendered in the District Court of Kansas upon said note the cause of action upon the note was terminated and wholly extinguished.

The record refutes the assertion that the immediate delay thereafter was caused by petitioner, but on the contrary

the bank did not plead to said affirmative defense but stood in default for six months, or until December 12, 1934, when, without notice, it obtained an order to file an amended petition (R. 31-32), which was a pleading complete within itself, without reference to the original petition, and stated a cause of action based solely upon a foreign judgment, to-wit, the Kansas judgment, duly authenticated in accordance with the federal statute. This pleading being complete within itself, superseded the original petition and the original petition no longer constituted a part of the record under the statutes and settled law of Oklahoma. (See *Lane* v. *Choctaw O. & G. Co.*, 19 Okl. 324, 91 Pac. 833, and other cases cited in supporting brief, pp. 17-18.) Petitioner, within twenty days, or January 2, 1935, filed a motion to strike said amended petition (R. 75), which motion came on for hearing February 4, 1935, and the court struck said pleading (R. 75). Respondent excepted to the order of the court but did not appeal.

Petitioner denies any responsibility for the immediate delay thereafter, as the record discloses respondent acquiesced in such order striking the pleading for nine months, at which time the statute of limitations (subdivision 4, section 101, O. S. 1931) had run on the Kansas judgment and the mortgages were extinguished (section 10957, O. S. 1931) by lapse of time, but permitted the action to remain dormant until November 6, 1935, when the respondent filed a motion (R. 76) to reconsider the previous order (R. 75) striking the amended petition and to treat it as a supplemental petition.

Notwithstanding the unwarranted, grave innuendoes and flagrant misstatements in the response, it is believed they are of little importance in determining the question

before this Honorable Court, which is: Have the rights granted the petitioner by the equal protection clause of the Fourteenth Amendment been violated?

Reply to Argument and Authorities.

Respondent persists in being inaccurate and on page 4 of the response, under the heading, "Argument and Authorities," asserts: "This being an ordinary action for personal judgment on a promissory note," although the amended petition upon which this judgment was rendered (R. 32) makes no reference to a promissory note, but is an action based solely upon a foreign judgment.

In our petition for writ of *certiorari* and brief in support thereof we attempted to make it clear that under the statutes of Oklahoma and the uniform decisions of the Supreme Court of said state which have not been reversed, modified or overruled, it is the settled law, *(a)* that upon judgment being rendered on a promissory note the cause of action is wholly extinguished and terminated (original brief, pp. 9-10); *(b)* that a cause of action on a foreign judgment constitutes a separate and independent cause of action (original brief, pp. 11-12); *(c)* a cause of action on a foreign judgment cannot be prosecuted by supplemental petition to an action on a promissory note, where the note was the basis of said judgment (original brief, pp. 13-18).

The petition presents the proposition that the opinion of the Supreme Court of Oklahoma in the instant case, without overruling, modifying or reversing said decisions as to the settled law of this state, denies to the petitioner the equal protection of the law, in that it holds that the statutes mean one thing for some persons and another for others similarly situated. Respondent, in response to said

proposition (though it asserts the opinion does not have that effect) does not attempt to discuss the decisions cited and relied upon by petitioner nor refer to any decisions to the contrary, but takes the bold position that even if the opinion does have the effect of holding that as to certain litigants the statute and former decisions of our court mean one thing and as to petitioner mean another thing, nevertheless there is nothing petitioner can do about it, or otherwise stated, that the court could acquire jurisdiction of the subject-matter of an action on a foreign judgment against petitioner without prosecuting an independent action thereon at the instance of respondent, even though it could not acquire such jurisdiction without the institution of such an independent action thereon at the instance of any other litigant or against any other defendant.

Respondent further contends that the judicial branch of the state may deny to persons similarly situated the equal protection of the law as guaranted under the Fourteenth Amendment to the Constitution of the United States, and, if the court does deny the equal protection of the law under said amendment to the Constitution, there is no remedy. In support of that theory they cite *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 to 92. A reading of this case discloses it has no application to the facts or record in the case at bar, nor was the constitutional question here involved either presented, considered or decided by this court in that case. The cause of action in said case originated in the state court and was removed to the federal court by reason of diversity of citizenship and the only question therein was whether the federal court upon removal was bound by the laws of the state, or whether it was free to disregard the rulings of the state court and to decide the question con-

trary to the decisions of said state court. The decision in said case is not in conflict with the rule announced by this court in the cases cited in our petition and supporting brief, pages 20-21, to the effect that a state court may not construe a statute to mean one thing for some litigants and another for others, and that such a construction does constitute an infringement of the constitutional rights guaranteed under the Fourteenth Amendment to the Constitution of the United States.

Conclusion.

The petition for writ of *certiorari* is a challenge to the constitutional validity of the ruling in this case whereby the statutes of Oklahoma are adjudged to mean one thing for some cases and another thing for others. This challenge clearly presents a federal question within the Fourteenth Amendment to the Constitution of the United States.

The response concedes, except by mere denial without more, the ruling challenged has the force and effect as contended for by petitioner, but assumes the bold position that the courts of the various states are at liberty to adjudicate statutes to mean one thing in some cases and another in others, depending upon the whim or caprice of the courts; and although said ruling constitutes a discrimination, the party discriminated against is without remedy, as no federal question is involved, even though said challenged ruling has the force and effect of a denial of the equal protection of the law guaranteed under the Fourteenth Amendment to the Constitution of the United States.

The question herein presented, considered in the light of the reponse, is of great public importance, for, if the law is as contended by respondent, the Fourteenth Amendment to the Constitution is stricken down as meaningless and the equal protection clause contained in the Fourteenth Amendment to the Constitution is made a mere scrap of paper and the rights guaranteed thereunder are unenforceable for want of a remedy.

It is, therefore, respectfully submitted that *certiorari* should issue.

Respectfully submitted,

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Counsel for Petitioner.

W. VALJEAN BIDDISON,
Of Counsel.

(38)

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No. 271

In the Supreme Court of the United States

October Term, 1941.

J. T. SMITH, *Petitioner,*

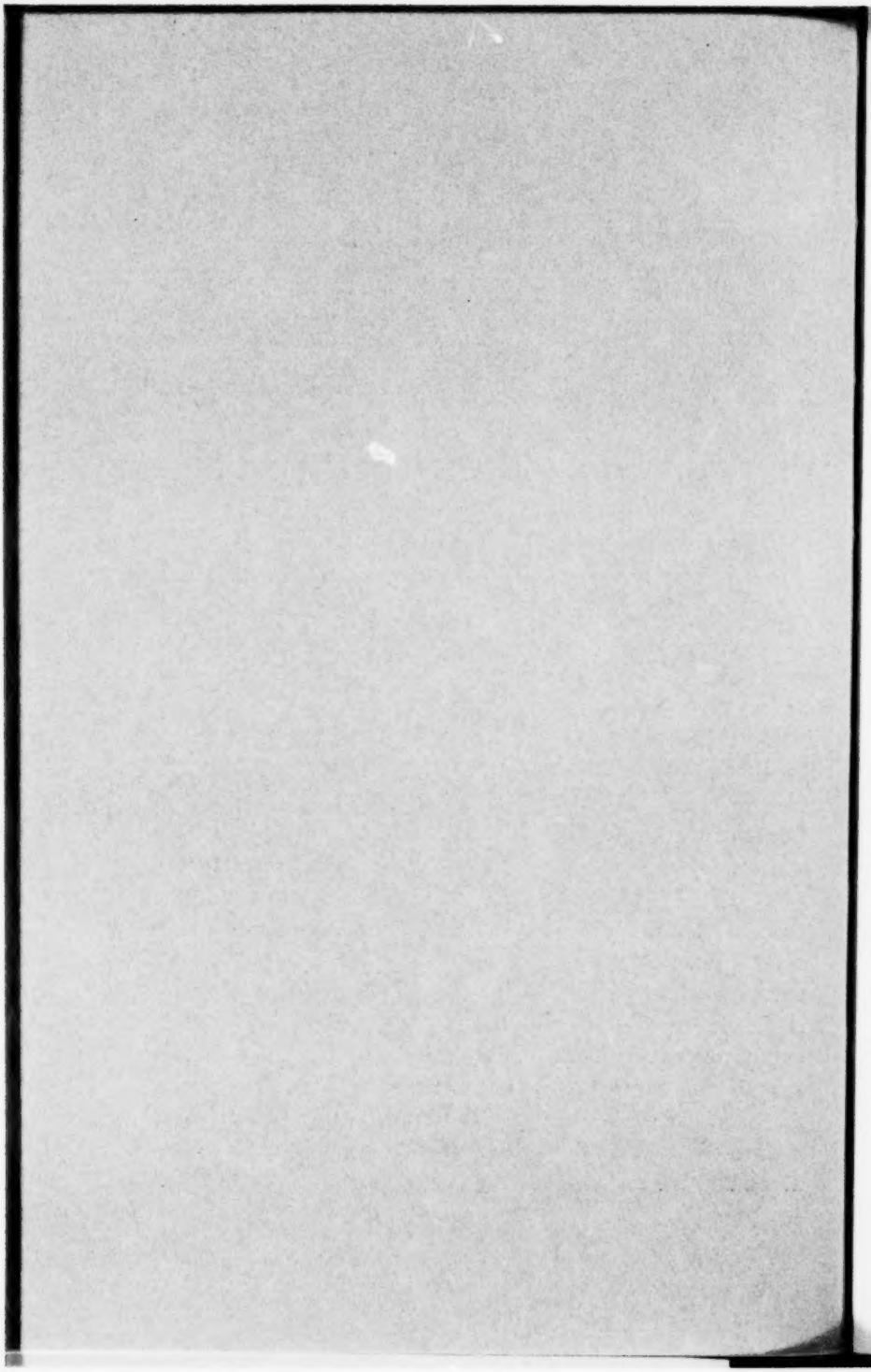
vs.

THE FOURTH NATIONAL BANK OF TULSA.

MOTION TO TAX COSTS.

NEAL E. McNEILL,
Solicitor and Attorney for Petitioner.

W. VALJEAN BIDDISON,
Of Counsel.



IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. 271

J. T. SMITH, *Petitioner,*
vs.
THE FOURTH NATIONAL BANK OF TULSA.

MOTION TO TAX COSTS.

Comes now the petitioner, J. T. Smith, and represents and shows to the court that the respondent, The Fourth National Bank of Tulsa, has, through its attorneys of record herein, necessitated the printing of practically the entire transcript of the record of this cause from the Supreme Court of the State of Oklahoma when the printing thereof was wholly unnecessary, the only necessary portion thereof being as set out in the proposed stipulation as to omissions from the printed record, as attached hereto and made a part hereof, same being marked "Exhibit B," which stipulation petitioner urged the respondent to enter into, all as hereinafter set forth; that the matter covered by said proposed stipulation would have been ample and sufficient to present to this court the entire matter arising on petitioner's petition for a writ of *certiorari* herein and the printed record in this court could have been thereby very materially reduced and the cost of printing the same very materlally re-

duced, the exact amount, however, not being known to petitioner;

That W. Valjean Biddison, hereinafter referred to as affiant, is and was at all the times herein mentioned one of the attorneys for J. T. Smith, the petitioner herein in the Supreme Court of the State of Oklahoma in the above cause, and one of the counsel for said petitioner herein; that on the 14th day of June, 1941, he submitted to G. C. Spillers one of the attorneys and solicitors for respondent, The Fourth National Bank of Tulsa, the attached designation of points relied upon, marked "Exhibit A," and made a part hereof, and the attached proposed stipulation as to omissions from the printed record, marked "Exhibit B" and made a part hereof, and requested said attorney to enter into said stipulation in connection with the petition for *certiorari* of said J. T. Smith, same having been duly executed by N. E. McNeill and said W. Valjean Biddison, as attorneys and solicitors for petitioner, and at the same time delivered to said G. C. Spillers copies of each of said documents, and simultaneously therewith affiant tendered to said attorney and solicitor for respondent the original transcript of the record from the Supreme Court of Oklahoma in said cause, which was subsequently filed in the above entitled court and cause, for his use in consideration of said proposed stipulation; that said G. C. Spillers then stated to affiant that he or his associates would later indicate to affiant whether they wanted to make use of said transcript of the record;

That thereafter and on June 16, 1941, Chas. L. Yancey, law partner of said G. C. Spillers and one of the attorneys and solicitors for respondent, stated to said affiant that respondent would not stipulate as to the portion of the transcript of the record to be omitted or to be printed and would not enter into said stipulation, and further said to him, "You had better go ahead and put in what you want," and

that respondent "wanted it all in"; that thereafter and subsequent to the filing of said transcript of the record herein and on June 19, 1941, said W. Valjean Biddison again delivered to said Chas. L. Yancey, as such attorney and solicitor, a copy of said designation of points relied upon and of said stipulation as to omissions from the printed record, and again requested the respondent to enter into said stipulation and the said Chas. L. Yancey again stated to said affiant that respondent would not enter into said stipulation and that he wanted the entire transcript of the record printed. Said affiant thereupon stated to the said Chas. L. Yancey that, as shown by the said statement of points relied upon, the petition was predicated upon the proposition that the Supreme Court of Oklahoma had denied petitioner the equal protection of the law and that there was much of the transcript of the record which was wholly unnecessary to a presentation of that question to this court and advised him of the clerk's estimate of the cost of printing the record in the absence of a stipulation, to-wit, the sum of $525.00, and said attorney and solicitor still declined to enter into any stipulation and declined to propose any stipulation, although said affiant asked him whether he desired to propose any stipulation.

Wherefore, petitioner prays the court to determine what portion of the transcript of the record should have been printed and was necessary to make up the printed record herein and the cost of printing same, and to tax any excess cost incurred in printing the record herein against the respondent, The Fourth National Bank of Tulsa.

.....,

NEAL E. MCNEILL,
Solicitor and Attorney for Petitioner.

.....,

W. VALJEAN BIDDISON,
Of Counsel.

State of Oklahoma, County of Tulsa—ss.

W. Valjean Biddison, of lawful, age, on oath states that he is one of the attorneys and of counsel for the petitioner herein; that he has read the foregoing motion and has knowledge of the facts therein stated and is authorized to make this affidavit; that the allegations of fact set forth in said motion are true and correct; that he verifies this motion for the reason that the petitioner does not have personal knowledge of the allegations of fact therein set forth, the same being peculiarly within the knowledge of this affiant.

....,
W. VALJEAN BIDDISON.

Subscribed and sworn to before me this .... day of November, 1941.

....,
Lucille Bradley, Notary Public.

My commission expires: Jan. 15, 1944.

State of Oklahoma, County of Tulsa—ss.

J. T. Smith, of lawful age, on oath states that he is the petitioner above named; that he has read the foregoing motion and knows the contents thereof; that the allegations of fact therein set forth are true and correct as he is informed and verily believes.

....,
J. T. SMITH,

Subscribed and sworn to before me this .... day of November, 1941.

....,
Lucille Bradley, Notary Public.

My commission expires: Jan. 15, 1944.

EXHIBIT "A."

Supreme Court of the United States. No. ...., October Term, 1940.

J. T. Smith, Petitioner, vs. The Fourth National Bank of Tulsa.

DESIGNATION OF POINTS RELIED UPON.

1. The Supreme Court of the State of Oklahoma has denied petitioner the equal protection of the law of said state in violation of the Fourteenth Amendment to the Constitution of the United States by its opinion promulgated in this action as set forth in the record herein.

2. Said denial arises from and is affected by the failure and refusal of the Supreme Court of Oklahoma to apply as the law of this action in favor of appellant, the well established and uniform law of said state as announced by the previous decisions of said court, which, since their rendition, have stood as the law of said state applicable to all litigants alike in the courts of said state, none of which have been overruled or modified.

3. The Oklahoma statute permitting the filing of supplemental pleadings by its terms permits only the filing of supplemental matter which is in aid of a then existing cause of action.

4. The trial court acquired no jurisdiction of the subject-matter of a purported supplemental petition which is not in aid of a then existing cause of action and which makes no reference to the original cause of action, but on the contrary is the subject-matter of a new, separate and independent cause of action.

5. A pending cause of action on a promissory note becomes merged in and wholly extinguished by a judgment on said note whether the judgment be rendered in said pend-

ing action or in any court of competent jurisdiction in any state in the Union.

6. The Supreme Court of Oklahoma has continuously and consistently, by its prior decisions, announced as the law the propositions contained in numbers 3, 4 and 5, *supra*, and said decisions have stood and been recognized as the law of the State of Oklahoma applicable to all litigants in the courts of said state alike, none of said decisions having been overruled or modified.

7. The respondent has been given a judgment *in personam* and for the foreclosure of a mortgage predicated solely upon a purported amended or supplemental petition which was not supplemental to or in aid of a then existing cause of action, but which declared solely upon a foreign judgment rendered on the note sued upon in the action in which the alleged supplemental pleading was filed, which foreign judgment merged therein the original cause of action on said note, when the law of Oklahoma, as written by its legislative department and by the decisions of its judicial department, has uniformly and consistently declared:

(A) That a cause of action on a note is merged in a judgment taken thereon and the cause of action on the note thereby wholly extinguished;

(B) That a court of said state is without power to permit the filing as a supplemental petition of matters which are not supplemental to and in aid of a then existing cause of action;

(C) A court acquires no jurisdiction of the subject-matter of a supplemental petition filed in a pending action which it does not supplement nor aid, or to refuse to administer the law in favor of appellant in the same manner it does other citizens of the state;

thereby denying appellant the equal protection of the law;

8. The District Court of Creek County, Oklahoma, under Oklahoma statutes as uniformly construed by the Oklahoma Supreme Court in other cases, acquired no jurisdiction of the subject-matter set forth in said amended or supplemental petition so filed as such in said original action on said note, by which petition respondent sought relief *in personam* only by declaring upon said Kansas judgment rendered *in personam*, without any reference therein whatever to the original cause of action on said note.

9. The appellant is entitled to have the law of the State of Oklahoma applied to this action in the same way that said law is applied to other litigants.

Neal E. McNeill,
W. Valjean Biddison,
Attorneys and Solicitors for Appellant.

The undersigned attorneys and solicitors for The Fourth National Bank of Tulsa, respondent herein, hereby acknowledge service of the foregoing designation of points relied upon by delivery to them by J. T. Smith, petitioner herein, of a true copy thereof, this 14th day of June, 1941, and again on June 19th, 1941.

Chas. L. Yancey,
G. C. Spillers,
Kavanaugh Bush,
Attorneys and Solicitors for the
Fourth National Bank of Tulsa.

EXHIBIT "B."

Supreme Court of the United States. No. ....., October Term, 1940.

J. T. Smith, Petitioner, vs. The Fourth National Bank of Tulsa.

STIPULATION AS TO OMISSIONS FROM THE PRINTED RECORD.

It is hereby stipulated by and between the petitioner, J. T. Smith, by his undersigned attorneys, and the respondent, The Fourth National Bank of Tulsa, a national banking corporation, by its undersigned attorneys, that,

Whereas, the petitioner is applying to the Supreme Court of the United States for a writ of *certiorari* to review the decision of the Supreme Court of the State of Oklahoma in an appeal therein by petitioner, in which court he was plaintiff in error and the respondent was defendant in error, No. 29465, and,

Whereas, it is necessary for petitioner to print the record for the use of the above entitled court as required by Rule 38 of said court, which rule also requires the counsel for the parties to this proceeding to stipulate to omit from the printed record all matter not essential to a consideration of the questions presented by the petition for the writ;

Now, therefore, it is stipulated and agreed that petitioner need only print the following portions of the record of the Supreme Court of Oklahoma (it being agreed that all other portions thereof are unnecessary and not essential to a consideration of the questions presented by the petition for the writ, and same may be omitted), to-wit:

I. The first ten lines of the petition in error and the following numbered paragraphs thereof, to-wit: 1, 3, 4, 7, 10, 11, 12, 13, 15, 16, 17, 18, 39, 40, 41, 42 (Tr. 2 to 7).

II. The first and second causes of action in the original petition (Tr. 13 to 16) showing same filed in the District Court of Creek County, Oklahoma, May 18, 1933.

III. That portion of separate answer and cross petition of petitioner (showing same was filed June 6, 1934) comprising paragraph numbered 2 (Tr. 45) and the last paragraph immediately preceding the prayer (Tr. 49).

IV. Order allowing respondent to file amended petition (Tr. 52).

V. (a) That portion of the amended petition comprising the first and second causes of action (Tr. 55-59);

(b) "which petition was filed in the District Court of Creek County, Oklahoma, December 12, 1934, and which further sought the foreclosure of four other mortgages on lands in Oklahoma" (Tr. 59-69);

(c) The following portion of the authenticated judgment of the Kansas court constituting Exhibit A to said amended petition, to-wit:

1. Authenticated certificate (Tr. 70-71);

2. The first cause of action in the petition in the District Court of Chautauqua County, Kansas (Tr. 72-73);

3. The first paragraph of the journal entry (Tr. 96);

4. That portion of the prayer constituting the last paragraph of the page (Tr. 98);

5. Journal entry (Tr. 113-114).

VI. Motion to strike amended petition (showing same filed January 2, 1935, Tr. 117);

VII. Order sustaining motion to strike (Tr. 120);

VIII. Motion to reconsider action of the court in striking (Tr. 123 and the first 2 lines of Tr. 124) (showing same filed November 6, 1935);

IX. Order sustaining plaintiff's motion to reconsider (Tr. 131-132);

X. Motion to vacate order down to and including the signatures (Tr. 135-136) (showing same filed December 13, 1935);

XI. Journal entry appearing at Tr. 139;

XII. Demurrer to amended petition (Tr. 151-153) (showing same filed December 21, 1937);

XIII. Order overruling demurrer (Tr. 156);

XIV. Answer of J. T. Smith (Tr. 159-164) (showing same filed February 5, 1938);

XV. Reply (Tr. 168) (showing same filed February 13, 1938);

XVI. The following portion of the trial proceedings in the District Court of Creek County, Oklahoma, which appear at Tr. 170-182:

(a) Recitation (Tr. 170);

(b) Statement and motion by Mr. McNeill (Tr. 176);

(c) Reservation of ruling by the court (top of Tr. 178);

(d) Objection by McNeill to introduction of evidence and reservation of ruling by the court (Tr. 178);

(e) Evidence and ruling (Tr. 180) beginning with the first question and continuing to end of page;

(f) Offer of plaintiff's Exhibit 1 (Tr. 181), objection thereto, statement by Mr. Spillers, rule of the court and exception;

(g) Offer by Mr. Spillers of Exhibit 8, beginning Tr. 184 and ending with the ruling of the court and the exception by McNeill at the top of page 185;

(h) Demurrer to evidence by Mr. McNeill commencing at bottom of Tr. 186 and including the first 4 lines, page 187;

(i) The last 10 lines of Tr. 187;

(j) Stipulation (Tr. 188), beginning line 10 and continuing to end of page;

(k) Lines 10 to 17, both inclusive (Tr. 189);

XVII. Journal entry of judgment, District Court of Creek County, Oklahoma (Tr. 212 and the first 7 lines of 213) and the formal part of the judgment decreeing a personal judgment and establishing liens, beginning with line 12 (Tr. 215), and continuing to end of page;

XVIII. Opinion of the Supreme Court of Oklahoma (Tr. 243-249, both inclusive);

XIV. Petition for rehearing and Proposition VI of the index and authorities there cited (Tr. 252, 253, 254) (excluding the caption and other portions of the index, and the brief and argument in support of the petition);

XX. Order denying petition for rehearing (Tr. 268);

XXI. Application for leave to file second petition for rehearing (Tr. 269-271);

XXII. Order denying leave to file second petition for rehearing (Tr. 283);

XXIII. Order staying proceedings on the mandate (Tr. 284);

XXIV. Order staying proceedings on the mandate (Tr. 285);

XXV. Certificate of clerk of Supreme Court of Oklahoma to transcript of record (Tr. 286).

Neal E. McNeill,
W. Valjean Biddison,
Attorneys and Solicitors for Petitioner.

.....,
Attorneys and Solicitors for the Fourth National Bank of Tulsa.

The undersigned attorneys and solicitors for The Fourth National Bank of Tulsa, respondent herein, hereby acknowledge service of the foregoing instrument by delivery to them by J. T. Smith, petitioner herein, of a true copy thereof, this 14th day of June, 1941, and again on June 19th, 1941.

Charles L. Yancey,
G. C. Spillers,
Kavanaugh Bush,
Attorneys and Solicitors for The Fourth National Bank of Tulsa.

Office - Supreme Court, U. S.
FILED
NOV 29 1941
CHARLES ELMORE CROPLEY
CLERK

No. 271

In the Supreme Court of the United States

October Term, 1941.

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

Response to Motion to Tax Costs.

CHAS. L. YANCEY,
G. C. SPILLERS,
KAVANAUGH BUSH,
Beacon Building,
Tulsa, Oklahoma,
Counsel for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. 271

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

RESPONSE TO MOTION TO TAX COSTS.

Comes now the respondent, The Fourth National Bank of Tulsa, Oklahoma, and respectfully submits that the application to re-tax costs, designated "Motion to Tax Costs," should be denied upon the following grounds:

(1) The application for writ of certiorari was denied, and under title 28, U. S. C. A., Sec. 352, which provides:

> "There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case except when the judgment is against the United States,"

the costs were properly taxed against the appellant.

(2) The application for writ of certiorari was denied on the 13th day of October, 1941, and under Rule 34 of this court an order was entered to that effect and counsel of record in the court below were notified promptly by the clerk of this court. This court no longer has jurisdiction of this case.

(3) Rule 13, Sec. 9, of this court provides:

> "When the record is filed, or within fifteen days thereafter, the appellant shall file with the clerk a definite statement of the points on which he intends to rely and a designation of the parts of the record which he thinks necessary for the consideration thereof or a designation of those parts considered unnecessary, whichever is more convenient, with proof of service of the same on the adverse party. The adverse party, within ten days after service of the statement and designation required to be filed by appellant may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the appellant. * * * If either party shall have caused unnecessary parts of the record to be printed, such order as to cost may be made as the court shall think proper."

The facts are that the respondent made no suggestions as to what the record should contain and hence, under the above rule, consented to submit the cause on the record prepared and presented by the petitioner. Attorneys for respondent simply accepted service of the record presented by petitioner and sat mute. Petitioner had a right to present his case on whatever record he saw fit. This he did, and, having failed in this court, must of necessity pay the cost of filing the application and printing the record.

Counsel for respondent specifically deny that they caused petitioner to print any part of the record in this cause. Petitioner was the moving party and took such steps as he and his counsel deemed proper.

Respondent attaches hereto affidavits of two of its attorneys, Chas. L. Yancey and G. C. Spillers, marks the same

Exhibits "A" and "B," respectively, and makes the same a part hereof.

Respondent respectfully submits that the application of petitioner to tax any part of the costs herein against respondent is wholly without merit and should be denied.

CHAS. L. YANCEY,
G. C. SPILLERS,
KAVANAUGH BUSH,
Beacon Building,
Tulsa, Oklahoma,
Counsel for Respondent.

"EXHIBIT A."

AFFIDAVIT.

State of Oklahoma, County of Tulsa—ss.

Chas. L. Yancey, of lawful age, being first duly sworn, on oath states:

That he is one of the attorneys for respondent referred to in motion to tax costs herein.

Affiant further states that Valjean Biddison, of counsel for appellant in this cause, suggested to him that it was not necessary from appellant's standpoint to print the entire record in this case, and suggested a stipulation, setting out what he thought were the salient points. This affiant thereupon advised said Valjean Biddison that he could print any part or all of the record he saw fit, and further advised him that respondent would not enter into such a stipulation as he suggested, for the reason that it appeared to be meaningless and wholly unnecessary; that if the case went to the Supreme Court, he thought the entire record should go, but made no requests or agreements concerning the record.

Further affiant saith naught.

CHAS. L. YANCEY.

Subscribed and sworn to before me this 21st day of November, 1941.

(Seal) Frances Thompson, Notary Public.

My commission expires: January 26, 1944.

"EXHIBIT B."

AFFIDAVIT.

State of Oklahoma, County of Tulsa—ss.

G. C. Spillers, being first duly sworn on oath deposes and says:

That he is one of the attorneys for respondent referred to in the motion to tax costs herein.

Affiant further states that when W. Valjean Biddison, one of the attorneys for the petitioner J. T. Smith, served certain papers on affiant as a member of the firm of Yancey, Spillers & Bush, attorneys for the respondent herein, affiant made no suggestions of whatsoever nature or kind as to what the record which petitioner proposed to present to this court should contain, but simply accepted the service of the documents presented without comment.

G. C. SPILLERS.

Subscribed and sworn to before me this 20 day of November, 1941.

(Seal) Frances Thompson, Notary Public.

My commission expires: Jan. 26, 1944.